

STATE OF VERMONT  
HUMAN SERVICES BOARD

In re	)	Fair Hearing Nos. R-10/09-557
	)	& R-02/10-43
Appeal of	)	

INTRODUCTION

The petitioner appeals the decision by the Department for Children and Families, Economic Services Division finding him ineligible for Reach Up Financial Assistance (RUFA) benefits. The issue is whether the petitioner is an "eligible parent" of "eligible children" for RUFA within the meaning of the pertinent regulations.

At a telephone status conference in the matter, held on February 12, 2010, the parties agreed that the Family Court had recently issued an Order regarding the respective parental rights and responsibilities of the petitioner and the mother of the children in question. The parties agreed that the Department would furnish the Board with a copy of this Order, and the Department did dispute that the Board's decision can and should be based on the terms of this Order.

FINDINGS OF FACT

1. The petitioner is the father of two minor children. He and the mother of the children are separated (it is unclear if they were ever married). The petitioner and the mother reside in different towns in Vermont.

2. The petitioner and the mother recently entered into

a stipulation whereby they have "joint custody" of the children. The stipulation was the basis of a Modified Order entered by the Family Court on January 19, 2010. It provides that the petitioner and the mother have joint and shared legal and physical rights and responsibility for their children, and that: "It is the understanding and intent of the parties that each parent shall have the children with him/her 50 percent of the time consistent with the following parenting schedule and provisions." The Order then provides, in painstaking detail, how that 50 percent time schedule is to be carried out.

3. The Order provides, however, that both children are, and shall remain, enrolled in school in the district where the petitioner resides. It appears that during the week the mother, herself, attends college. Despite the children's school attendance, over the course of a year the petitioner and the mother are to have equal time with them, both quantitatively and qualitatively. It appears that both parents maintain full "homes" for the children with separate rooms, clothes, furniture, and toys.

4. The Stipulation and Order setting forth the above schedule is to remain strictly in effect for at least two years.

5. It appears that the children's mother is currently receiving RUFA in the children's behalf.

ORDER

The Department's decision is reversed.

REASONS

W.A.M. § 2231 defines an "eligible parent" for RUFA as "an individual who . . . lives in the same household with one or more eligible . . . children." "Home" is defined by W.A.M. § 2302.12 as follows:

A "home" is defined as the family setting maintained, or in process of being established, in which the relative assumes responsibility for care and supervision of the child(ren). However, lack of a physical home (i.e. customary family setting), as in the case of a homeless family is not be itself a basis for disqualification (denial of termination) from eligibility for assistance.

The child(ren) and relative normally share the same household. A "home" shall be considered to exist, however, as long as the relative is responsible for care and control of the child(ren) during temporary absence of either from the customary family setting.

In cases of joint custody the Board has held (and the Vermont Supreme Court has affirmed) that it is the parent that provides the primary "home" for the children who is eligible for RUFA. Fair Hearing No. 5553 (Aff'd, Munro-Dorsey v. D.S.W., 144 Vt. 614 [1984]). The Board has also held that in an otherwise-equal or near-equal joint custody situation the parent with whom the children reside while they are attending school should be considered to be

providing the "primary home" for these children. Fair Hearing Nos. 11,182 and 9521.

In Fair Hearing Nos. 11,182 and 9521 the Board noted that a state education statute (16 V.S.A. § 1075) provides that the "legal residence" of a student is where either of his parents resides. In this case, the Family Court has, in effect, designated the petitioner's home as being the children's "legal residence" for purposes of education. In both prior cases the Board held that "consistency dictates" that, all other things being equal, a child's "primary home" for RUFA purposes should be that of the parent where he or she attends school.

The facts of the instant case appear indistinguishable from these two cases. Like in those cases, although both parents of the petitioner's children share equally the time and responsibility for their care and support, there is no other area of parenting in which the mother "predominates" enough, if at all, to "compensate" for the matter of school attendance in determining that the children's "primary home", at least for the time being, is with their father, the petitioner.<sup>1</sup> The fact that the mother herself may

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<sup>1</sup> A Department "procedure" (P-2210[A][4][a]), purportedly adopted in 1994, simply does not address eligibility issues when *both* parents in a joint-custody situation apply for RUFA. Even if it did, because it is not a duly-promulgated regulation, to the extent that it would then directly conflict with prior Board and Supreme Court precedent, it could not be considered binding on the Board under 3 V.S.A. § 3091(d).

presently be receiving RUFA benefits for the children does not alter the above analysis.<sup>2</sup> See Fair Hearing No. 10,732.

In light of the above, the Department's decision in this matter finding the petitioner ineligible for RUFA must be reversed. 3 V.S.A. § 3091(d) and Fair Hearing Rule No. 1000.4D.

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<sup>2</sup> Of course, the mother is not a party to this fair hearing, and this decision makes no findings or legal conclusions regarding the mother's eligibility for RUFA. That is up to the Department to determine, and the mother has the right to appeal any adverse decision in this regard.